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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-966

AMERICAN FOREIGN STEAMSHIP COMPANY, a corporation,

Petitioner,

vs.

LILLIAN M. MATISE, as personal representative of GRANVILLE C. MATISE, deceased,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

ERIC J. SCHMIDT
528 Mills Tower
220 Bush Street
San Francisco, California

Counsel for Respondent

IN THE

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Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent LILLIAN M. MATISE is representing an estate which is devoid of funds. She asks leave to proceed in forma pauperis pursuant to Rule 53 and to file the attached Memorandum In Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in accordance therewith.

The respondent's affidavit in support of this

motion is attached hereto.

Respectfully submitted,

Eric J. Schmidt

ERIC J. SCHMIDT
Counsel for Respondent

DATED: February 13, 1975
at San Francisco, California

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No._____

AMERICAN FOREIGN STEAMSHIPS' COMPANY, a corporation

Petitioner

vs.

LILLIAN M. MATISE, as personal representative of GRANVILLE C. MATISE, deceased

Respondent

AFFIDAVIT

I, Lillian M. Matise, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. My name is Lillian M. Matise. I reside at Route 2, Box 106, Waldorf, Maryland.

2. On November 30, 1971, the Register of Wills for Charles County, State of Maryland, appointed me the Personal Representative of the Estate of Granville C. Matise, deceased, and I am presently serving in that capacity.

3. The estate of Granville C. Matise is unable to pay the costs of responding to the Petition for Certiorari in this case unless I am permitted to proceed in forma pauperis.

Lillian M. Matise
Lillian M. Matise

Duly witnessed and sworn to before me, a Notary Public, this 21st day of February, 1975.

Diane H. Wenbler
Notary Public

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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COUNTER STATEMENT OF THE ISSUES PRESENTED

1. Only one issue was presented to the Appellate Court below in the appeal from which this petition derives. That issue is not presented by this Petition for Certiorari.

2. None of the three issues recited by the petitioner in its Petition for Certiorari is properly before this Court.

3. The single question presented below was dismissed as being frivolous.

The sole question presented to the Ninth Circuit Court of Appeals was: Did the judgment on mandate which was made by the trial court below following decision of an earlier appeal conform to the Appellate Court's mandate?

STATEMENT OF THE CASE

The seaman Matise brought an action in the District Court to recover (1) wages which had been taken by the defendant shipowner to reimburse itself for the cost of transporting Matise home following a foreign discharge for cause; (2) the double-wage penalty provided by TIT 46 U.S.C.A., Section 596, for the "refusal or neglect" to pay wages when due.

The District Court denied his claim (App. to Pet. i.)

The Court of Appeals reversed, holding that the wage taking was illegal and was done without sufficient cause, subjecting the shipowner to the penalty (App. to Pet. iv.--xiii.). Matise v. American SS Co., No. 72-1345, 488 F.2d 469.

The shipowner's petition for a rehearing was denied. The time allowed the shipowner to apply for certiorari expired on

July 5, 1974, without any application having been made.

Pursuant to mandate, the trial court made its judgment awarding the seaman his wages and the double-wage penalty for the period of the wrongful withholding (App. to Pet. xv.).

The shipowner filed its Notice of Appeal from this judgment on July 15, 1974. This second appeal was docketed as American Foreign SS Co. v. Matise, No. 74-2721.

The only question presented was whether or not the trial court's judgment conformed to the Appellate Court's decision in No. 72-1345, which decision had not been challenged after the shipowner's petition for rehearing had been denied.

The Appellate Court recognized the limited nature of the second appeal (ORDER - filed September 27, 1974 - App. to Pet. xvii.), and dismissed it as frivolous. The Court in banc refused to rehear it (App. to Pet. xviii.). The present Petition for Certiorari is from the decision in the second appeal, American Foreign SS Co. v. Matise, No. 74-2721. It does not present for review by this Court those issues which were decided and left unchallenged in Matise v. American Foreign SS Co., No. 72-1345. The statement of issues in the Petition for Certiorari is completely erroneous. The only question which could properly be placed before this Court on this Petition for Certiorari is not even referred to.

ARGUMENT

The petitioner's principal complaint is that it was not permitted to advance and argue the defense of the "tailoring"

theory in the trial court following the issuance of mandate.

There are three separate reasons why this complaint is without merit.

I. The concept itself is illegal. It is a judge-created device which devitalizes the penalty provision which itself provides the only real incentive for shipowners to respect the statutes protecting seamen's wages. Under this "equitable" concept, the act of Congress in doubling the penalty in 1915 can be totally negated by any judge, who can give whatever portion of the older one-for-one penalty that he wishes.

The entire theory rests upon misconceptions which courts have been misled by shipowners' counsel into accepting.

The feeling has been assiduously cultivated that the wage penalty, if enforced in the clear terms in which it is stated by Congress, quickly becomes a kind of Frankenstein turned loose in the land, which somehow gets beyond human control and results in atrocious abuses. This view depends upon several completely erroneous beliefs.

a) That the shipowner is helpless to put a stop to the running of the penalty before the matter is adjudicated, which takes years.

This fallacy was given early expression in the 1927 case of Mystic Steamship Co. v. Stromland, 21 F.2d 607 (4th Circuit) and the two excerpts from that decision have become classic in briefs of shipowners' counsel:

"To deny the penalty during such delay is but a

reasonable application of the doctrine of laches."

"It was certainly not the intention of Congress that the statute would be construed in such a way as to virtually deny shipowners the right to contest liability in cases of this sort by making the penalty so great in case of failure to maintain the defense asserted as to deter them from making any defense at all."

FACT:

The penalty can be stopped at any time, unilaterally by the employer, by the simple act of depositing the disputed wages and penalty accrued to date with the Court.

Gerber v. Spencer, 278 Fed. 886,889 (9th Cir. 1922);

Forster v. Oro Naviq. Co., 128 F.Supp. 113, Aff'd. 228 F.2d 319 (1955);

Samad v. Etivebank, 134 F.Supp. 530, 542 (E.D. Pa, 1955)

Southern Cross v. Piripis, 285 F.2d 651 (4th Cir. 1960)

This costs nothing and creates no risk. The seaman gets nothing unless the Court awards it to him as the result of the trial. The shipowner recovers all of the money which it does not legally owe to the seaman. In some cases the deposit can be made on the day the dispute arises, in which case there will be no penalty. In all cases the deposit can be made at an early stage of the controversy, at a time when the penalty amounts to no more than reasonable compensation for a mistake and not a punitive levy.

b) A second related fallacy is that the seaman, by delaying filing his action, can run up an unconscionable penalty which the shipowner is helpless to prevent.

/////

FACT:

As either an addition or alternative to the deposit, the shipowner can procure a prompt judicial determination of the controversy merely by filing for a declaratory judgment. It does not have to await any act by the seaman. Under Rule 57, the Court may advance the matter on the calendar to provide a speedy hearing. The provisions of TIT 28, Sections 2201 and 2202, make this remedy admirably suited for the prompt disposition of penalty wage suits.

The helplessness of the shipowner to control the penalty provides the entire foundation for the leaning tower of authorities supporting the "tailoring" theory. When the simple facts remove this foundation, the tower is left suspended in error.

Why have these available remedies been ignored and loud wailing by shipowners against "unconscionable" acts of seamen been substituted for them? The answer might well lie in the hope of employers that if the penalty becomes large enough--when contrasted with the amount of wages involved--this fact will impel many courts to seek a way to avoid awarding any of it.

In truth, the amount of the penalty which accrues after the shipowner learns of the seaman's claim is a direct measure of the employer's contempt for the seamen's rights. The penalty grows only while the employer refuses to make the good faith showing which is a common requirement in other areas of the law, i.e., the deposit of disputed monies with a stakeholder to await a judicial determination. (In order for an escrow arrangement of this

kind to be effective, it is essential that all of the money to which a contending party could become entitled under the decision be placed on deposit. In penalty-wage claims this includes the penalty accrued to date as well as the net wages.)

II. The attempt to assert the defense was untimely.

In those circuits where it is permitted, the doctrine which allows cutting down the wage award to some fraction of the statutorily-computed amount ("tailoring") is based upon the defense of laches. It is grounded upon the alleged prejudice to the shipowner which results when a seaman delays filing his action.

Laches is an affirmative defense which must be pleaded. F.R.C.P. Rule 8(c):

> "(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award . . . laches . . . and any other matter constituting an avoidance or affirmative defense . . ."

The appellant pleaded the relief he was seeking specifically and plainly. He demanded the statutory amount in his Complaint.

> "Complaint, Paragraph XI:
>
> "By reason of the facts above set forth, the plaintiff was and is entitled to receive his withheld wages in the sum of $510.00 and two days' pay for each day that the defendant refused and neglected without sufficient cause to pay said wages." (Emphasis added.)

The appellant repeated his demand for the full and undiminished statutory penalty in his prayer. (Paragraph 4.)

In its answer to appellant's demand for the double-wage penalty, the appellee pleaded only denial.

> "Rule 8(c) requires the defense of laches to be made affirmatively in the district court, and Rule 12(b) requires that such an affirmative defense be made by a responsive pleading."
> Apex Liquors, Inc. v. District of Columbia, 5 FR Serv. 2d 81, 303 F.2d 206 (App.D.C. 1962)

At the trial, the appellee did not refer to the defense of laches or offer any evidence on the subject of limiting damages. Appellee did not seek to amend its answer to state any affirmative defense.

The trial was not bifurcated. The damage issue was tried, as well as the liability issue. Had the case been tried to a jury, the court would have been required to give BAJI Instruction No. 15.22 or its federal equivalent, FJPI 78.05.

The appellee simply did not assert the defense of laches or any other affirmative defense at the trial. That was its last opportunity under the rules to do so.

On appeal, the appellant stated the precise amount in dollars and cents of the damages he claimed. (Appellant's Opening Brief, p.2.). Neither in its brief nor in oral argument did the appellee make any reference to diminishing or limiting the damages.

Following judgment by the Ninth Circuit, the appellee filed a Petition for Rehearing in which it described those aspects of the law which it contended the Appellate Court had misjudged

or misapprehended. No reference was made to any theory for limiting the amount of damages.

Following denial of its first petition, the appellee filed a second, for a Rehearing In Banc, and for Recall of Mandate. In neither of these was the subject of limiting the amount of the damages referred to.

III. The "tailoring" concept would not apply to this case in any event.

Even if the tailoring concept were an established part of the applicable law, and even if the shipowner here had raised it in timely fashion,--still, the concept would have no application in the present case because the facts would not support it.

While it is not practicable to set forth the necessary facts in this memorandum, the record will clearly show that the seaman acted diligently at every stage of his claim and even tried to eliminate routine delay by bringing a motion for summary judgment long before the scheduled trial.

CONCLUSION AND PRAYER

Under this Court's rules, the present petitioner's right to seek certiorari is restricted to an issue which the petitioner has ignored. The issues described by the petitioner as viable have in fact all perished from the petitioner's inaction.

These facts make this present petition a sham.

These facts have been made known to petitioner.

To pursue certiorari in these circumstances constitutes

a misuse of this Court's process and an abuse of the respondent's time, energies and money.

Respondent respectfully requests this Court to dismiss the application herein and to award her counsel reasonable compensation for the expenses and delay caused by the petitioner's unjustified acts.

Dated: February 14, 1975.

Respectfully submitted,

Eric J. Schmidt

ERIC J. SCHMIDT
Counsel for Respondent